

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-1401, 76-1407

To be argued by  
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
ALAN MICHAEL FITZGERALD and  
ERIC STANCHICH,  
  
Defendants-Appellants.

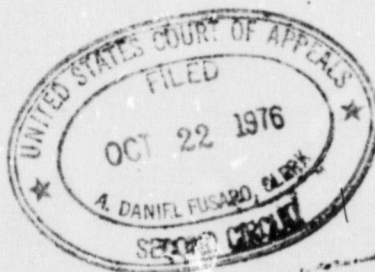
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PMS  
  
Docket No. 76-1401  
Docket No. 76-1407

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APPENDIX TO THE BRIEF  
FOR APPELLANT ERIC STANCHICH

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
ERIC STANCHICH  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

DAVID J. GOTTLIEB,  
Of Counsel.

PAGINATION AS IN ORIGINAL COPY



U.S. DISTRICT COURT - CRIMINAL DOCKET

Case No. **0208** **1** District Office  
 Assigned Trial **0851** Disposition  
 U.S. vs. **STANCHICH, ERIC**

Case Filed  
 Day **2** Mo. **12** Yr. **75** Docket No. **1162** Def. **02**  
 No. of **02** Defendants

CHARGES  
**18:371** **Consp. to possess. & attempted sale of counterfeit Treasury Bill.**  
**18:472&473** **Transferring & delivering counterfeit Treasury Bill.**  
 Defendant  
 Edward J. Levitt, Sp. Atty. Aaron R. Schacher  
 (212) 791-1150  
 32 Court Street, Bklyn, NY 11201  
 Tel. UL 5 1003

MAGR. CASE NO. **75-1524**  
 BAIL - RELEASE  
☐ Personal Recog  
☐ Denied ☐ Unsecured Bond  
☐ Conditional Release  
 Set (0000) ☐ 10% Deposit  
 \$ **10.** ☐ Surety Bond  
 date ☐ Collateral  
☐ Bail Not Made ☐ 3rd Party  
☐ Bail Status Changed ☐ Custody  
 (See Docket) ☐ PSA

ARREST **11-12-75** ☐ High Risk ☐ Info **12-2-75** ☐ Waived ☐ Superseding ☐ Indict/Info  
 INDICTMENT ☒ Information ☐ Waived ☐ Superseding ☐ Indict/Info  
 ARRAIGNMENT **12-15-75** ☐ 1st Plea **12-15-75** ☐ Final Plea  
 TRIAL **06-28-76** ☒ Not Guilty ☐ Nolo ☐ Guilty ☐ Not Guilty ☐ Nolo ☐ Guilty  
 Trial Set For **06-28-76** ☐ Voir Dire  
 Trial Began **6-29-76** ☐ Trial Ended **7-1-76**  
 SENTENCE **7-1-76** **9-7-76**  
☒ Convicted ☐ On All Counts ☐ On Lesser Offenses  
☐ Acquitted ☐ Dismissed ☐ WOP ☐ WOT  
☐ Noted/Discontinued

SEARCH WARRANT	ISSUED	DATE	INITIAL/NO.	INITIAL APPEARANCE	INITIAL/NO.	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District Ct. <input type="checkbox"/> Held to Answer to U.S. District Court <input type="checkbox"/> Exonerated <input type="checkbox"/> To Transferred District BOND AT: <i>[Signature]</i> Magistrate's Initials
	Return			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived		
Arrest Warrant	Served			Tape No.		
COMPLAINT						
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information

DATE **FITZGERALD-1** PROCEEDINGS

**12-2-75** Filed indictment.

**12-15-75** Deft. (atty. present) Pleads not guilty. Bail \$10,000. PRB Secured by \$500. continued. Case assigned to Judge Pierce for all purposes. Werker, J.

**12-18-75** Filed the following papers rec'd from Magistrat Raby. (Mag # 75-1524)  
 Docket entry sheet  
 Appearance Bond in the sum \$10,000 Secured with \$500 Cash co-signed by wife Maria E. Stanchich - 31 Demarest Place, Harrington Park, New Jersey 07640.....  
 Criminal Complaint .....  
 Disposition Sheet

**1-6-76** Filed notice of appearance of Aaron R. Schacher, 32 Court Street, Bklyn NY 11201 Tel. UL 5 1003.

**1-20-76** Deft. present with his atty. Aaron R. Schacher present - Trial 4-19-76 Present bail cont'd as to both defts. Pierce J.

**2-9-76** Filed Defts. affidavit and notice of motion for an order directing separate trial

**2-9-76** Filed Defts. affidavit & notice of motion for an order suppressing evidence.

V. Excludable Delay  
 (a) (b) (c)

*[Large handwritten number 1401]*

DATE	Page #2	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
			(a)	(b)	(c)	(d)
02-13-76		Filed Gov'ts. Memorandum of Law.				
02-13-76		Filed Gov'ts. Affidavit in opposition to motion to suppress.				
02-17-76		Filed Bill of Particulars				
02-17-76		Filed Gov'ts. Affidavit in opposition to motion to Sever.				
02-24-76		Filed Defts. Affirmation & notice of motion for an order to furnish defts. atty. the names & addresses of all Gov't. witnesses the Gov't intends to call during trial.				
03-05-76		Filed Gov'ts. Memorandum of Law.				
03-05-76		Filed Gov'ts. Affidvt. in oppositin to disclosure of names of witnesses.				
03-09-76		Filed Sealed Envelope to be Sealed & Unsealed only at the Direction of the Undersigned or Another Federal Judge. .....Pierce J. Ex Parte Affidvt. in opposition to disclosure of names of witnesses.(Place in the Vault)				
03-16-76		Filed Memo. End. on motion dtd. 2-9-76 .Motion denied. Pierce J. (mailed notice)				
03-16-76		Filed Memo. End. on motion dtd. 2-24-76. Accordingly, defts. motion is in all respects denied.....Pierce J. (mailed notice)				
04-13-76		Filed Gov'ts/ request to charge/				
04-13-76		Filed Gov'ts Proposed examination of prospective jurors				
04-15-76		Filed Memo. End. on motion dtd.2-9-76. A hearing on the motion to suppress will be held before the commencement of the trial. .....Pierce J.(mailed notice)				
04-15-76		Filed Gov'ts. request to charge.				
04-15-76		Filed Gov'ts. Proposed examination of prospective jurors.				
04-14-76		Pre Trial Conference held - Both dfts. present & their attys.- Aaron Schoeler for dft. Stanchich- New Trial date 6-28-76- @ 9:30 am.....Pierce J.				
04-21-76		Filed Gov'ts Supplemental Affidvt. in response to motion for discovery.				
6-23-76		Pre Trial Conference Held.				
6-29-76		Jury Trial begun as to both dfts. on all cts.				
6-30-76		Trial Cont'd.				
7-1-76		Trial Cont'd - Count One dismissed by the Court. Court charge jury. Jury verdict reached. Both Dfts. Guilty on Counts 2 & 3 P.S.I. Ordered - Sentences September 7, 1976 @ 4:30 P.M. Room 619. Bail cont'd as to both dfts.....Pierce J.				
7-6-76		Filed 2nd Memo. End. on motion dtd. 2-9-76. Upon the courts representation that the material in question will not be offered at trial, the motion is denied, as moot....Pierce J. (mailed notice)				
7-15-76		Filed transcript of record of proceedings, dated 4-14-76				
7-15-76		Filed transcript of record of proceedings, dated 1-27-76				
Interval			(a)	(b)	(c)	(d)
Start Date			Ltr. Tons			
End Date			Code Day			



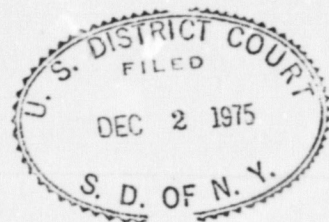
Criminal

C. 110 Rev. ~~EXX~~ Docket Continuation

Page #3

DATE	PROCEEDINGS	Date Order Judgment No.
9-7-76	Filed Judgment & Commitment (Atty. Aaron Schacher Present) The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of counts 2 & 3 to run concurrently with each other. Pur. to Title 18, U.S. Code Section 4205(b) (2), the dft. shall become eligible for parole at such time as the Parole Commission may determine. Dft. is continued on present bail until 9/21/76 at 10:30 a.m., at which time he is to surrender to the U.S. Marshal in room 506 to commence service of sentence.....Pierce J. Issued Commitment 9-9-76	
9-5-76	Filed Dfts. Notice of Appeal from Judgment dtd. 9-7-76. (ma)	
9-21-76	Transcript of record of proceedings dated 1/20/76	
9/21/76	Transcript of record of proceedings dated 2/6/76	
9/21/76	Transcript of record of proceedings dated 6/29/30 & 7/1/76	
9/21/76	Transcript of record of proceedings dated 9/7/76	
9/21/76	Transcript of record of proceedings dated 9/7/76	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
UNITED STATES OF AMERICA :

-v- :

ALAN MICHAEL FITZGERALD, :  
a/k/a "Mike" and :  
ERIC STANCHICH, :

Defendants. :

INDICTMENT

75 Cr.

75 CRIM. 1132

-----X  
COUNT ONE

The Grand Jury charges:

1. From on or about November 10, 1975, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, ALAN MICHAEL FITZGERALD, a/k/a "Mike" and ERIC STANCHICH, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury unknown, to violate Sections 472 and 473 of Title 18, United States Code.

2. It was a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly, with intent to defraud, would pass and attempt to sell, and would keep in their possession and conceal a falsely made, forged, counterfeited and altered obligation and other security of the United States, to wit, one United States Treasury Bill in the denomination of \$100,000 bearing Serial Number 178246B and bearing an Issue Date of June 19, 1975 and a Due and Payable Date of December 18, 1975.

3. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would transfer and deliver a false, forged, counterfeited and altered obligation and other security of the United States, to wit, the United States Treasury Bill described in paragraph 2 of Count One of this indictment, with

DFILM

3 1975



the intent that the same be passed, published and used as true and genuine.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed and caused to be committed the following overt acts, among others, in the Southern District of New York.

a. On or about November 10, 1975, the defendant ALAN MICHAEL FITZGERALD, a/k/a "Mike", met a Special Agent of the United States Secret Service, who, working undercover, was posing as a corrupt bank officer, at the Cattleman's Restaurant, 5 East 45th Street, New York, N. Y.

b. On or above November 10, 1975, the defendant ERIC STANCHICH followed the Special Agent above referred to when that agent left a meeting with the defendant ALAN MICHAEL FITZGERALD, a/k/a "Mike", at the Cattleman's Restaurant, 5 East 45th Street, New York, N. Y.

c. On or about November 12, 1975, the defendant ALAN MICHAEL FITZGERALD, a/k/a "Mike", physically possessed, in the borough of Manhattan, City of New York, the counterfeit United States Treasury bill described in paragraph 2 of Count One of this Indictment.

d. On or about November 12, 1975, the defendant ERIC STANCHICH drove the defendant ALAN MICHAEL FITZGERALD, a/k/a "Mike", from the Market Diner, located at 43rd Street and 11th Avenue, New York, N. Y., to the vicinity of Stone and Whitehall Streets in the "Wall Street" area of New York, N. Y.

e. On or about November 12, 1975, the defendant ALAN MICHAEL FITZGERALD, a/k/a "Mike", delivered the counterfeit United States Treasury Bill described in paragraph 2 of Count One of this Indictment, in front of 11 Trinity Place, New York, N. Y., in the "Wall Street" area, to the Special Agent of the United States Secret Service above referred to.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about November 12, 1975, in the Southern District of New York, ALAN MICHAEL FITZGERALD, a/k/a "Mike" and ERIC STANCHICH, the defendants, unlawfully, wilfully and knowingly, and with intent to defraud, did pass and attempt to sell, and did keep in their possession and conceal a certain falsely made, forged, counterfeited, and altered obligation and other security of the United States, to wit, one United States Treasury Bill in the denomination of \$100,000 bearing Serial Number 178246B and bearing an Issue Date of June 19, 1975, and a Due and Payable Date of December 18, 1975.

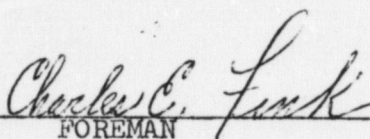
(Title 18, United States Code, Sections 472 and 2.)


COUNT THREE

The Grand Jury further charges:

On or about November 12, 1975, in the Southern District of New York, ALAN MICHAEL FITZGERALD, a/k/a "Mike" and ERIC STANCHICH, the defendants, unlawfully, wilfully and knowingly did transfer and deliver a certain false, forged, counterfeited and altered obligation and other security of the United States, to wit, one United States Treasury Bill in the denomination of \$100,000 bearing Serial Number 178246B and bearing an Issue Date of June 19, 1975, and a Due and Payable Date of December 18, 1975, with the intent that the same be passed, published and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2.)

  
FOREMAN

  
THOMAS J. CAHILL  
United States Attorney





**United States District Court**  
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ALAN MICHAEL FITZGERALD,  
a/k/a "Mike" and  
ERIC STANCHICH,

Defendants.

**INDICTMENT**

75 Cr.

THOMAS J. CAHILL

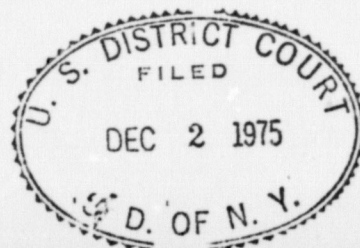
United States Attorney

A TRUE BILL

*Charles C. Link*

Foreman

FPI-SS-1-13-70-20M-4925



12/4/75 - Indictment filed.  
JUDGE PIERCE

12/15/75 - Dep. Alan Michael Fitzgerald (No counsel present)  
Court directs a NOT GUILTY plea be entered.

Bail (\$20,000. PRB secured by \$1000) continued  
Dep. Eric Stanchich (Atty: Lawrence  
S. Goldman) pleads NOT GUILTY. Bail  
(\$10,000. PRB secured by \$500.) continued.

~~Deferred~~ Assigned to Judge  
Pierce for all purposes.

JANUARY 20, 1976 - Dep. Stanchich present with his  
att. Aaron R. Schacker - present - Dep. Fitzgerald  
present No atty - Trial 4-19-76 - Present  
bail cont'd add to both depts.

February 5, 1976 - Conference held as to Pierce J &  
Dep. Fitzgerald - Dep. present - no atty - case  
referred to Magistrate - Rm 115 for assignment of  
counsel. Same bail cont'd -

April 14, 1976 - Pre Trial Conference held - Book dictated  
present + 11 attys - Aaron Schacker for dep. Stanchich - Jesse  
Berman for dep. Fitzgerald - New Trial date 6-28-76 - 9:20  
Pierce J



JUNE 28, 1976 - Pre Trial Conference held

JUNE 29, 1976 - Trial <sup>Jury</sup> begun as to both depts on ~~base~~ all

JUNE 30, 1976 - Trial cont'd

JULY 1, 1976 - Trial cont'd - ~~Count 1~~ Count one dismissed

by the Court. Court charges jury. Jury verdict reached.

Both depts' guilty on counts 2 and 3 - PST ordered

Sentences September 7, 1976 - at 4:30 Rm 619. Bar

cont'd - as to both depts'

Piero J

SEP 7 1976 - Dept Stanchek present with his atty - dept

sentenced to 3 years on each of cts 2 + 3 to run ~~concurrent~~

with each other. Purs. to T-18, Sect 4205 (b) (2)

dept shall become eligible for parole at such time as the

Parole Commission may determine. Dept is cont'd on

present bail ~~at~~ until Sept 21, 1976 at 10:30 at which

time he is to surrender to U.S. Marshal. Dept's motion to

clerk ~~to~~ file notice of appeal in forma pauperis is granted.

Dept Fitzgerald present with atty Jesse Berman - dept

sentenced to 3 years on cts 2 + 3 to run ~~concurrent~~ with each

other. Purs. to T-18-Sect 4205 (b) (2), dept shall become eligible

for parole at such time as Parole Commission may determine.

Bail pending appeal is ~~fixed~~ cont'd C \$20,000 PRB sec

\$1,000 cash. Bail is to be re-written + posted pending

appeal.

CHARGE OF THE COURT

Hon. Lawrence W. Pierce

THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave the courtroom will do so now or remain seated until the completion of the Court's charge.

THE COURT: Counsel, Mr. Foreman, ladies and gentlemen of the jury:

First, let me thank you for your punctuality, and for the sacrifices which you have made in serving on this jury. By serving on the jury you contribute importantly, as I told you earlier, to the administration of justice, and for this all of us are grateful to you.

I wish to also thank the attorneys for their cooperation during this trial. I ask you now to give me your attention so that you might understand the principles of law which are applicable in this case.

First, let me point out some general principles relating to your duties; relating to what you may or may not consider during your deliberations.

As I told you before, it is the Judge's function to instruct you as to what law applies in the case, and it is your duty to accept the law as I state it to you, and



1       mdrf 291  
2       it is your duty to apply the law to the facts in this  
3       case as you find those facts to be from the evidence.

4               I ask you not to single out any one instruction  
5       alone as stating the law but rather to consider the  
6       instruction as a whole.

7               The logical result of your application of the  
8       law to the facts which you find should be a verdict,  
9       a verdict of guilty or not guilty, with respect to each  
10      count, with respect to each defendant.

11              Now, you are indeed the sole and exclusive  
12      judges of the facts in this case. You are the ones who  
13      must pass upon the weight of the evidence, and determine  
14      the credibility of witnesses, and resolve such conflicts  
15      as there may be in the evidence.

16              You are the ones who must draw reasonable  
17      inferences, such reasonable inferences as are warranted  
18      by the testimony and the exhibits in this case.

19              With respect to any matters of fact it is true  
20      that it is your recollection and yours alone which governs.  
21      Anything the attorneys may have said, whether the attorney  
22      for the Government or the attorney for a defendant, or  
23      anything which I may have said or may say as to any  
24      matters in evidence or as to any factual matters, is not  
25      to be substituted for your own independent recollection

1 of the evidence in this case, and is not to be accepted  
2 as the facts of this case because you heard it from any  
3 of us.  
4

5 Now, you are not to assume that I have any  
6 opinion as to whether or not either defendant is guilty  
7 or not guilty. I have no opinion as to the truth or  
8 falsity of the charges asserted in this indictment. The  
9 fact that I have asked questions, granted or denied motions  
10 during the course of the trial, is not to be taken by you  
11 as any indication that the Court believes that either  
12 defendant is guilty or not guilty.

13 Further, the attorneys have the right on the offer  
14 of certain evidence to press legal objections, and in  
15 doing so they are simply performing their duty. In your  
16 deliberations to determine the facts and whether the  
17 Government has established the elements of the crimes  
18 charged, you are to consider solely the testimony which  
19 you have heard from the witnesses, any stipulations of  
20 fact which the attorneys have agreed upon, and the exhibits,  
21 including tapes, which have been received in evidence.  
22 You may consider even any lack of material evidence, but  
23 nothing else.

24 As I told you earlier in the trial certain  
25 evidence was being received subject to connection.



I have already instructed you that I have found this evidence to be connected, and thus that it may be considered by you along with all other evidence in the case.

Please remember that this ruling does not in any way represent a finding by this Court as to what the facts are. That determination must be made by you, the jury. I have simply ruled that the evidence in question may be considered by you as you perform your function of determining what the facts are.

The indictment in this case contains two counts against each defendant. Each count states a separate charge against each defendant. You have heard reference to a conspiracy charge. As I have told you this charge is no longer before you and you are not to consider it in any way in your deliberations.

In the determination of whether a defendant is guilty or not guilty of the crimes charged you must remember that guilt is personal, and that the determination of whether a defendant is guilty or not guilty must be determined solely on the evidence admitted as to the defendant you are considering.

As you approach the performance of your function in this case -- that is, the determination of whether any defendant you are considering, either of them, is guilty

1 or not guilty -- please remember that is your duty to weigh  
2 the evidence calmly and dispassionately without sympathy  
3 or prejudice for or against any party. The fact that  
4 the Government is a party here, or that the prosecution  
5 occurs in the name of the United States of America,  
6 entitles it to no greater consideration than that accorded  
7 to any other party to this case, and by the same token it  
8 is entitled to no less consideration. Indeed, all parties,  
9 Government and individuals alike, stand equal before the  
10 law.  
11

12 Each defendant on trial has pleaded not guilty  
13 to the counts with which he is charged. Consequently,  
14 if either defendant is to be convicted the Government  
15 has the burden of proving each and every element of the  
16 crimes charged beyond a reasonable doubt as to that  
17 defendant.

18 The burden of proving guilt beyond a reasonable  
19 doubt never shifts. The law never imposes upon a  
20 defendant in a criminal case the burden of calling any  
21 witness or producing any evidence. You may not draw any  
22 unfavorable inference against a defendant because he did  
23 not take the stand and testify.

24 In addition, you may not speculate as to why  
25 a defendant chooses to testify. Nor may you speculate



as to what a defendant might have stated had he chosen to testify.

In every criminal case there is a constitutional right which every defendant has the right to rely upon. It is the rule that no defendant is compelled to take the witness stand. It is the prosecution which must prove a defendant guilty as charged beyond a reasonable doubt.

A defendant is not required to disprove anything. He is not required to establish his lack of guilt. A defendant has no obligation to call any witnesses or his behalf, or offer any evidence whatsoever, including asking any questions on cross examination.

In short, it is up to the Government to prove beyond a reasonable doubt every element of crimes charged in the indictment beyond a reasonable doubt as to each defendant.

Each defendant is presumed to be not guilty of the accusations contained in the indictment. This presumption continues throughout the trial and even during the course of your deliberations in the jury room.

The presumption of innocence is sufficient to acquit a defendant of a crime charged unless it is overcome by evidence that satisfies your minds beyond a reasonable doubt of the defendants' guilt.

1 Unless you are so satisfied it is your sworn  
2 obligation to find the defendant you are considering  
3 not guilty. If you are so satisfied it is your sworn  
4 obligation to find the defendant you are considering  
5 guilty.  
6

7 So the question arises what is a reasonable  
8 doubt? Well, it is a doubt which a reasonable person has  
9 after carefully weighing all the evidence. It is the  
10 kind of doubt which would make you hesitate to act  
11 in most important affairs in your life.

12 Reasonable doubt is doubt which appeals to your  
13 reason, your judgment, your common sense, your experience;  
14 it is not caprice or whim or speculation. It is not an  
15 excuse to avoid the performance of an unpleasant duty.  
16 It is not sympathy for any party.

17 If after a fair and impartial consideration of  
18 all of the evidence or lack of evidence you can honestly  
19 say that you don't have an abiding belief as to either  
20 defendants' guilt then you have a reasonable doubt and  
21 it is your duty to acquit that defendant.

22 On the other hand, if after a fair and impartial  
23 consideration of all of the evidence you can honestly say  
24 that you do have an abiding believe as to either defendants'  
25 guilt, then you have no reasonable doubt and it is your  
duty to convict that defendant.



2 A reasonable doubt does not mean positive  
3 certainty beyond all possible doubt. The law in a  
4 criminal case is that it is sufficient if the guilt of  
5 a defendant is established beyond a reasonable doubt, not  
6 beyond all possible doubt.

7 From time to time you may have heard reference  
8 made to direct evidence and to circumstantial evidence.  
9 Let me explain the difference.

10 Direct evidence is where a witness testified  
11 to what he saw or heard or observed of his own senses,  
12 something the witness knows or testifies that he knows of  
13 his own knowledge, something which comes to him by virtue  
14 of his senses. This is direct evidence.

15 Circumstantial evidence is evidence of facts  
16 and circumstances from which one may infer connected  
17 facts which reasonably follow in the common experience  
18 of mankind.

19 To state it a little differently, circumstantial  
20 evidence is a fact or a series of facts in evidence which  
21 have a logical tendency to lead the mind to a conclusion  
22 that another fact exists even though there is no direct  
23 evidence to that effect.

24 Let me give you a brief example. If when you  
25 filed out during one of the recesses you looked and

mdrf 298

1 saw that it was sunny outside, and all the windows in the  
2 courtroom here were closed, and all the window sills beneath  
3 them were dry, and then after a 10 or 15 minute recess  
4 you returned to the courtroom and all the windows were  
5 still closed but as you looked out you saw that it was  
6 raining, and if you saw that there was water on those window  
7 sills upon your return you could conclude that someone  
8 had opened the windows and rain had come into the  
9 courtroom and fallen upon the window sills.  
10

11 Now, you would arrive at this conclusion from  
12 circumstantial evidence. You would infer, in other words,  
13 on the basis of reason and experience from one or more  
14 established facts the existence of some further fact.

15 Now, a conviction may not rest upon suspicious  
16 circumstances alone. However, circumstantial evidence,  
17 if believed, is of no less value than direct evidence,  
18 for in either case you must be convinced beyond a reasonable  
19 doubt of the guilt of the defendant you are considering.

20 There are times different inferences may be  
21 drawn from the same facts whether proved by direct or by  
22 circumstantial evidence. The Government asks you to draw  
23 one set of inferences and a defendant asks you to draw  
24 another set.

25 It is for you and you alone to decide what  
reasonable inferences you choose to draw from the



evidence in this case. Indeed, it is your duty to determine the reasonable inferences to be drawn from the facts as you find those facts to be from the evidence. But remember that you may not indulge in guesswork or speculation.

Now, there are a number of factors which are not evidence in the case and which may not be considered by you during your deliberations.

First, if during the course of the trial a question is asked, and an objection was made, and I sustain the objection, you are to disregard the question and any alleged facts contained in the question. If there was an answer to the question you are to disregard the answer.

Similarly, if I rule that an answer be stricken from the record you are to disregard the answer and the question in your deliberations. These are not evidence and therefore cannot be considered by you in any respect.

As I told you at the beginning of the trial, an indictment is not evidence. It is a procedure by which persons accused by a grand jury of crimes are brought to trial. And whether the persons accused are guilty or not guilty of the crimes charged is determined by a trial jury such as you.

Lastly, I should tell you, as you are well aware,

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there have been several instances during the course of the trial for the lawyers to confer with the Court out of your hearing. You are not to speculate as to what was discussed. Such conferences have been held at the bench to avoid having you listen to arguments on questions of law which concern only the attorneys and the Court.

Certain evidence in this trial was admitted by way of a tape recording of an alleged telephone conversation. You were given a transcript of the tape recording as an aid to your hearing of the evidence on the tape. The tape is the evidence in this case. The transcript is not. It was given to you only to aid you in your hearing of the tape. Therefore, if the transcript appeared to you to vary from the tape in any respect it is your hearing of the tape that governs.

You as the jury must determine as the trier of the facts what was said in the conversation for which a tape recording was offered into evidence.

You as jurors are the sole judges of the credibility of the witnesses. You also must determine the weight their testimony deserves. You know there is no automatic way to tell who is telling the truth and who is not. Credibility can be equated with believability.

If a witness is credible we say the witness is



believable. You should carefully scrutinize all the testimony given on direct and cross examination or redirect or otherwise and the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider the witness' ability to observe the matters as to which he has testified, and whether the witness impresses you as having had an accurate recollection of these matters.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness made statements inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and thus discredited it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves.

In judging credibility you should consider any relation any witness may bear to any side of the case. Consider the manner in which a witness might be affected by the verdict and the extent to which if at all each witness is either supported or contradicted by other evidence in the case.

If you find that any witness has wilfully

1 testified falsely as to any material matter you may reject  
2 the entire testimony of that witness or you may accept  
3 such portion of it as you believe to be true.  
4

5 The results of evidence ordinarily doesn't  
6 permit witnesses to testify as to opinions or conclusions.  
7 An exception to that rule exists in the case of those  
8 we call expert witnesses, witnesses who by virtue of  
9 education and experience have become expert in some science,  
10 profession or calling. Such witnesses are permitted to  
11 state their opinions as to relevant and material matter  
12 in which they profess to be expert and may also state their  
13 reasons for the opinion.

14 In this case you will recall that the parties  
15 stipulated that if the Government's expert witness had  
16 been called to testify that 4 in evidence is a counterfeit  
17 treasury bill and 5 in evidence is a photograph of a  
18 counterfeit treasury bill and 9 in evidence was used as  
19 a pattern to print or make both 4 in evidence and 5 in  
20 evidence.

21 Did I state it correctly, gentlemen?

22 MR. BERMAN: Yes, sir.

23 MR. LEVITT: Yes, your Honor.

24 THE COURT: All right.

25 Your role in judging credibility applies to



experts as well as to other witnesses.

Now, all that means here is that you are to consider the expert opinion which the attorneys have stipulated would be the testimony that would have been presented here had the expert been called, and you are to give such testimony as much or as little weight as you think it deserves. If you decide that the opinion of an expert is outweighed by other evidence then you may disregard the opinion entirely.

There has been testimony in this case with respect to the use of persons sometimes referred to as cooperating persons or informants or informers. These services are availed of by government agents at times as an aid to law enforcement. The law permits the use of informants provided the rights of the defendant are not violated. Whether or not you approve of the use of an informant in an effort to detect violations of law is not to enter into your deliberations.

With reference to this I instruct you that the testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage, or vindication, must be examined and weighed by the jury with great care. The jury must determine whether the informer's testimony has been

1 affected by self-interest or by prejudice against either  
2 defendant.  
3

4 With regard to all witnesses the ultimate  
5 question for you to decide in passing on the credibility  
6 of a witness is: Did the witness tell the truth  
7 before you. It is for you to say whether a witness'  
8 testimony at this trial was truthful or untruthful in  
9 whole or in part.

10 Now, I am going to turn to a discussion of the  
11 specific charges, and instruct you as to what the  
12 essential elements of each of these charges are.

13 The Government, of course, has the burden of  
14 proving each essential element with respect to each  
15 charge and must do so beyond a reasonable doubt in order  
16 to sustain its charges against each defendant.

17 The first charge with which you are to concern  
18 yourself here is Count 2.

19 The defendants in Count 2 are charged with having  
20 violated a particular section of the U.S. Code, which  
21 provides in pertinent part as follows:

22 "Whoever, with intent to defraud, pass or  
23 attempts to sell, or with like intent keeps in possession  
24 or conceals any falsely made, forged, counterfeited or  
25 altered obligations or other securities of the  
United States, is guilty of a crime."



Let me read Count 2 to you. It is brief.

"The grand jury charges, on or about November 12, 1975, in the Southern District of New York, Alan Michael Fitzgerald and Eric Stanchich, the defendants, unlawfully, wilfully, and knowingly, and with intent to defraud, did pass and attempt to sell and did keep in their possession and conceal a certain falsely made forged, counterfeited and altered obligation or other security of the United States, to wit, 1. U. S. treasury bill in the denomination of \$100,000 bearing serial number 178247B, and bearing an issue date of June 19, 1975, and a due and payable date of December 18, 1975 in violation of federal statute."

What are the essential elements of that crime? In order to find either of the defendants guilty of the crime charged in that count, Count 2, you must find that the Government has proved the following essential elements beyond a reasonable doubt as to the defendant you are considering.

First, that on or about November 12, 1975, in the Southern District of New York, the particular defendant passed or attempted to sell or kept in possession or concealed the falsely made, forged, counterfeited or altered U. S. treasury bill specified in Count 2.

The indictment is available to you to have in the jury room if you wish to have it. If you wish to have it of course you should sent out a note and ask for it.

Second: That at the time the defendant knew the U. S. treasury bill specified in Count 2 was counterfeit.

Third: That in so doing the defendant acted with intent to defraud.

I am going to define some of the terms used in these elements.

Counterfeit as applied in this case means forged or immitated U. S. treasury bills. A counterfeit is a fraudulent and criminal imitation of a U. S. treasury bill prepared so as to resemble or pass for an actual legitumate U. S. treasury bill.

The test in determining whether the particular bills in question are counterfeit is whether the bills bear such a likeness or resemblance to any genuine U.S. treasury bill issued under the authority of the United States as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with the person supposed to be upright and honest.

What about the word passing? Passing occurs when a counterfeit bill is transferred from one person



to another, or given in payment, or is delivered by the passer to another person in exchange for something of value, such as money.

Let me define possession. You may find that a counterfeit bill was in a particular defendant's possession if you find that the defendant knowingly had such a bill in his power or under his command. The Government does not have to prove that the goods were possessed by the defendant from the time they were printed or indeed for any particular length of time.

The word possession means either physical possession or what we call constructive possession.

Now, a person has constructive possession of something if he knows where it is, and has the power to get it at any time he wants it, or can otherwise exercise control over it.

What about falsely made? Well, falsely made means in this case a piece of paper which resembles in appearance a genuine U.S. treasury bill but which in fact is not such.

Finally, I instruct you that a U.S. treasury bill of whatever denomination is an obligation and security of the United States.

Moving on to the second element, in order to

convict the defendant I have told you that you must find that at the time the defendant knew the U.S. treasury bill specified in Count 2 was counterfeit.

Well, you must find that the defendant you are considering knowingly passed or attempted to pass or possessed -- let me go back.

In order to convict a defendant you must find that the defendant you are considering knowingly and wilfully passed or attempted to sell or possessed a counterfeit bill. That is to say, that he knew that a bill which he passed or attempted to sell was counterfeit.

Knowingly means to act voluntarily and intentionally and not because of mistake or inadvertence or because of some other innocent reasons.

Wilfully means to act knowingly, deliberately, and with a bad purpose or motive, but it is not necessary that a defendant know he is breaking any particular law.

You may find that a defendant knowingly passed or attempted to sell or possess the counterfeit bill if you find that he knew that it was counterfeit at the time he passed it, or attempted to sell it, or concealed it.

During the course of the trial you have heard testimony that a particular defendant attempted to sell the bill in question for a small fraction of face



1 value. I instruct you that if you believe that  
2 evidence such proof permits, though it does not require,  
3 an inference that a defendant knew of the counterfeit  
4 nature of the bill at the time that the bill was offered  
5 for sale.  
6

7 However, I also instruct you that mere possession,  
8 use, or even passing of a counterfeit bill does not in and  
9 of itself establish guilty knowledge.

10 With respect to the third element which I  
11 mentioned, the Government must prove that the defendant  
12 you are considering acted with an intent to defraud, which  
13 means that the defendant acted at the time specified in  
14 the indictment with knowledge that the bill in question  
15 was counterfeit and with a specific unlawful intent.  
16 That is, to knowingly pass or attempt to sell or possess  
17 a counterfeit bill with intent that it ultimately be  
18 accepted as genuine and that somebody be defrauded thereby.

19 In determining whether or not a defendant had  
20 the necessary intent you are instructed that even if  
21 the persons who ultimately receive the bill -- in this  
22 case, agents of the Secret Service -- knew the bill was  
23 counterfeit that knowledge is irrelevant to your determination  
24 and has no bearing on whether a defendant had the intent  
25 necessary to commit the criminal violation of law charged.

I caution you that mere possession of a counterfeit bill without knowledge that it is counterfeit does not establish intent to defraud.

However, since counterfeit U.S. treasury bills have no honest use except when they are in the possession of public authorities, if you find that either defendant possessed the bill in question knowing it to be counterfeit, if you find that it was, you may infer but you are under no obligation to do so, that the intent of the defendant you are considering was to use that bill fraudulently.

In determining whether either defendant knowingly and wilfully and with intent to defraud committed the offenses with which he is charged, issues of fact are present, and clearly these issues concern what is in one's mind.

It is not always possible to ascertain or prove directly the operation of the mind or the intention of a person. You cannot look into defendants' minds to see what his intentions were. You cannot look into a witness' mind to see what his intentions were. But you are able to consider all of the facts and circumstances shown by the evidence, and the exhibits in the case, and you are able to draw your own conclusions with a reasonable degree of accuracy as to what if anything the



intentions of either of the defendants were. You can do that because you bring into the jury box your common sense and the experience of your daily lives.

Intent involves a mental attitude. From evidence of particular actions coupled with evidence of surrounding circumstances one may choose to draw certain conclusions. In other words, proof of the circumstances surrounding a person's actions, if found to exist, can supply an adequate basis for a finding that a defendant acted knowingly and wilfully.

While I am discussing this issue of the defendant's intent or state of mind let me remind you that there was certain evidence admitted during the trial which bore on the issue of intent with respect to one or the other of the defendants. Let me discuss that with you now. That is the alleged prior similar acts, the very first evidence presented when the trial got under way.

You have heard evidence which may lead you to believe that each defendant was involved in alleged conduct which is said by the Government to be similar to that charged in the indictment in this case. This evidence is not to be considered by you in determining whether the defendant you are considering committed the acts charged in the indictment, or for any other purpose,

1 unless you first find that the other evidence you have  
2 heard standing alone establishes beyond a reasonable doubt  
3 that the defendant you are considering committed the  
4 acts charged in this indictment.  
5

6 If you find beyond a reasonable doubt, based  
7 solely on evidence other than the alleged prior similar  
8 acts, that the defendant you are considering did commit  
9 the acts charged in the indictment, then you may consider  
10 evidence of the alleged similar act to whatever extent  
11 you wish in determining the state of mind or the motive  
12 or intent with which the defendant did the particular  
13 acts which you have found occurred.

14 Now, if you find that a similar act has been  
15 established by the Government then you are free, if you  
16 choose to, to draw an inference that in doing the acts  
17 charged in the indictment here the defendant acted in this  
18 case knowingly and intentionally and not because of  
19 mistake or accident or for innocent reason.

20 In this case the Government must also show that  
21 the acts charged took place within the Southern District  
22 of New York. I charge you as a matter of law that the  
23 Borough of Manhattan in the State of New York is within  
24 the Southern District of New York.

25 If you find that the Government has proved each



of the elements I have described for you beyond a reasonable doubt as to a particular defendant then you should find that defendant guilty as to Count 2.

If you find the Government has failed to prove any element as to a particular defendant then you should find that defendant not guilty as to Count 2.

Let me move on to Count 3, which is the last of the two counts.

The defendants are charged in Count 3 with having violated a particular section of the U. S. Code which reads in pertinent part as follows:

"Whoever transfer or delivers any false, forged, counterfeited or altered obligation, or other security of the United States, with the intent that the same be passed, published or used as true and genuine, is guilty of a crime."

Count 3 reads in the indictment: "On or about November 12, 1975, in the Southern District of New York, Alan Michael Fitzgerald and Eric Stanchich, the defendants, unlawfully, wilfully, knowingly did transfer and deliver a certain false, forged, counterfeited and altered obligation and other security of the United States, to wit, one United States treasury bill in the denomination of \$100,000 bearing serial number 178246B, and bearing

an issue date of June 19, 1975, and a due and payable date of December 18, 1975, with the intent that the same be passed, published and used as true and genuine in violation of the federal statute."

What are the essential elements of this Count 3? In order to find either of the defendants guilty of the crime charged in Count 3, you must find the following facts beyond a reasonable doubt.

First, that on or about November 12, 1975, in the Southern District of New York, the defendant you are considering transferred or delivered the counterfeit United States treasury bill specified in Count 3.

Second, that at the time the defendant you are considering knew the United States treasury bill specified in Count 3 was counterfeit.

Third, that in so doing that defendant acted with the intent that the counterfeit bill be passed, published, or used as true and genuine.

I will define some of these terms where necessary. By delivery I mean the act by which an object, in this case a treasury bill, is placed within the actual or constructive possession or control of another.

Again, counterfeit as applied in this case means forged or imitated United States treasury bill.



A counterfeit United States treasury bill is a fraudulent and criminal imitation of a United States treasury bill prepared so as to resemble or pass for an actual legitimate United States treasury bill.

The test in determining whether the particular bills in question are counterfeit is whether the bills bear such a likeness or resemblance to any genuine United States treasury bill issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest.

As to the second element, in order to convict either defendant of Count 3 you must find that the defendant you are considering knowingly and wilfully sold or delivered a counterfeit bill -- that is to say that he knew that a bill that he sold or delivered was counterfeit. Knowingly I have already defined to you. It means with knowledge. A defendant knowingly sold or delivered a counterfeit bill if he knew it was counterfeit at the time he sold or delivered it.

You will recall my earlier definitions of knowingly and wilfully. These apply to Count 3 as well.

The third element that the Government must prove

as to the defendant you are considering is that that defendant acted with an intent that the counterfeit United States treasury bill be passed, published or used as true and genuine, which means that the defendant acted on November 12, 1975, with knowledge that the bill in question was counterfeit, and with a specific unlawful intent. That is, an intent that at some time in the future some one or more members of the public would be given the counterfeit bill as payment for something or would be told that this bill was true and genuine, or would deal with the bill in some way under the mistaken assumption that it was true and genuine, without knowing that it was counterfeit.

It is not necessary that the defendant have had any particular persons in mind as the persons who would be defrauded or to whom the bill was passed as true and genuine. The Government does not have to prove that the defendant ever actually caused any person to suffer a pecuniary loss from having accepted the bill in the mistaken belief that it was genuine, nor is it necessary, if you find that the bill was passed, published or used as true and genuine, to find that a defendant himself did so in order to find that the defendant had the necessary intent. The possessor of the bill need not



2 personally pass, publis, or use it as true and genuine.  
3 It can be done by an intermediary, innocent or otherwise.

4 In determining whether or not a defendant had  
5 the necessary intent you are instructed that even if  
6 the persons who ultimately received the bill -- in this  
7 case agents of the Secret Service -- knew the bill was  
8 counterfeit that knowledge is irrelevant to your determination  
9 and has no bearing on whether the defendant had the necessary  
10 intent to commit a criminal violation of this law.

11 The persons who ultimately received the bill  
12 did not have to be duped.

13 I remind you of the instructions I gave earlier  
14 regarding determining a defendant's knowledge and intent.

15 Now, I have set forth the necessary elements  
16 of the offenses you must find before you can return a  
17 verdict of guilty with regard to the two counts in the  
18 indictment before you. In this connection I instruct you  
19 that it is not necessary for you to find that any person  
20 suffered any pecuniary loss because of the alleged actions  
21 of the defendant before you can return a verdict of  
22 guilty with regard to either defendant as to any particular  
23 count in this case.

24 I remind you again that with respect to both  
25 counts 2 and 3 the Government must show that the acts

1 charged occurred in the Southern District of New York,  
2 and I have already charged you that the Borough of Manhattan  
3 is within the Southern District of New York.  
4

5 If you find that the Government has proved each  
6 of these three elements that I have described beyond  
7 a reasonable doubt as to a particular defendant then you  
8 should find that defendant guilty as to Count 3.

9 If you find that the Government has failed to  
10 prove any element as to a particular defendant then you  
11 should find that defendant not guilty as to Count 3.

12 Now, I have one remaining section to read to  
13 you. Would you stand with me, however, to just sort of let  
14 the blood circulate a little bit.

15 (Pause.)

16 THE COURT: In this case each of the defendants  
17 is also charged with what is called aiding and abetting  
18 the other defendant in the commission of the crimes with  
19 which each of the defendants is charged.

20 Now that aiding and abetting statute reads  
21 as follows:

22 "Whoever commits an offense against the United  
23 States or aids or abets or counsels, commands or induces,  
24 or procures its commission, is punishable as a principal."

25 Under this statute it is not necessary for the



Government to show that a defendant himself physically committed the crimes with which he is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find either defendant guilty of any of the offenses with which he is charged if you find beyond a reasonable doubt with respect to the particular count and the particular defendant you are considering that the Government has proved that another person actually committed the offense with which the defendant is charged and that the defendant aided or abetted him in committing that offense.

As you can see from the language of the law, the first requirement is that you find that another person has committed a crime against the United States. Obviously, one cannot be held responsible for criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed then you must consider whether the particular defendant you are considering aided and abetted the commission of the crime.

In order to aid or abet another to commit a crime

2 in this case it is necessary that the accused person  
3 wilfully and knowingly associate himself in some way  
4 with the crime charged and that he wilfully and knowingly  
5 seek by some act to help make the crime successful.

6 I already explained to you the meaning of the  
7 words wilfully and knowingly. The mere presence of a  
8 defendant where a crime is being committed, even coupled  
9 with knowledge by the defendant that a crime is being  
10 committed, or the mere negative acquiescence by a defendant  
11 in the criminal conduct of others, even with guilty  
12 knowledge, is not sufficient to establish aiding and  
13 abetting. An aider and abettor must have some interest  
14 in the criminal venture.

15 To determine whether a defendant aided or  
16 abetted the commission of the offenses with which he is  
17 charged in the indictment ask yourselves these questions.  
18 Did he participate in the crime charged as something he  
19 wished to bring about?

20 Did he associate himself with the criminal venture  
21 knowingly and wilfully?

22 Did he seek by his action to make the criminal  
23 venture succeed?

24 If he did, then he is an aider and abettor and  
25 therefore guilty of the offense you have found to have



been committed. If he didn't, then he is not an aider and abettor and is not guilty of the offence.

This completes my instructions to you with respect to the elements which you must find that the Government has proved beyond a reasonable doubt before you may convict either defendant on either of the counts with which he is charged.

I remind you that as to any one count if you find that the Government has not proved each of the elements I have described beyond a reasonable doubt as to the particular defendant you are considering then it is your duty to acquit the defendant as to that count.

On the other hand, if you find with respect to any count the Government has proved each of the required elements beyond a reasonable doubt with respect to the defendant you are considering then it is your duty to convict that defendant as to the crime charged in that count.

I ask you to note that a separate crime or offense is charged in each of the two counts of the indictment. Each charge against each defendant and the evidence pertaining to it should be considered separately.

The fact that you find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to the other offenses charged

1  
2 against the same defendant. Likewise, the fact that you  
3 find one defendant guilty or not guilty as to any  
4 particular charge should not control your verdict as to the  
5 other defendant.

6 Also, you are not to consider in any way or  
7 speculate about the sentence which a defendant may receive  
8 if found guilty. It is the function of the jury to  
9 deliberate and determine whether a defendant is guilty or  
10 not guilty, on the basis of the evidence, and the Court's  
11 instructions.

12 It is the function of the Judge to determine  
13 thereafter the disposition of the defendant's case.

14 The most important part of the case is the part  
15 which is now your part. It is you who will have to  
16 determine whether verdicts of guilty or not guilty are  
17 to be returned. I know you will try the issues that have  
18 been presented to you according to the oath which you  
19 have taken as jurors. You will recall that in that oath  
20 you promised that you would well and truly try the issues  
21 joined in this case and a true verdict render.

22 If you follow that oath and try the issues  
23 presented here without confusing your thinking with emotions  
24 you will arrive at a just verdict. As you deliberate  
25 please be careful to listen to the opinion of other jurors



as well as to ask for an opportunity to express your own views. No one juror holds the center of the stage in the jury room, and no one juror controls or monopolizes deliberations.

All of you must express your views and exchange views, and if you become convinced that your original view was wrong with respect to any matter, don't be afraid to change your vote because of pride in your original opinion or in reaction to the stubbornness of another person.

On the other hand, don't surrender your honest beliefs solely because of the opinion of your fellow jurors or because you are outnumbered. You understand that in a criminal case in this court your verdict on each count as to each defendant must be unanimous. That is, it must be joined in by each and every one of you. The form of the verdict will be either guilty or not guilty as to each defendant as to each count of the indictment that is before you.

During your deliberations you can send for any exhibits in evidence that you wish to review. You can request that any testimony be read back to you. You can request that any portion of this charge be read back to you. If you send out a note requesting exhibits, please try





MR. SCHACHER: Your Honor, I have no exceptions whatsoever.

THE COURT: Mr. Berman?

MR. BERMAN: Nothing except as previously noted.

THE COURT: Mr. Levitt?

MR. LEVITT: No exceptions, your Honor.

THE COURT: Bring the jury back in.

(In open court, jury present.)

THE COURT: Have the alternates any garments in the jury room?

(No response.)

THE COURT: All right.

Swear the marshal.

(Marshal sworn.)

THE COURT: Now, ladies and gentlemen, we have now reached the point where my instruction to you is to go into the jury room and to discuss the case among yourselves. You are now to deliberate, talk about the case, exchange views, and do as you have been instructed.

Mr. Foreman, lead the jury out.

Alternates should remain.

(Jury excused to begin deliberations.)

THE COURT: Ladies and gentlemen who have served as alternates, we thank you for your services.

THE COURT: We will take the motions.

Mr. Schacher, I will hear you first.

MR. SCHACHER: If it please the Court, at this time as to Mr. Eric Stanchich I respectfully move the Court for a directed verdict of acquittal as to each and every count of the indictment.

THE COURT: Do you wish to argue the motion in any way at all? Your option.

MR. SCHACHER: At the present time I feel the Government has failed to establish any conspiracy and has failed to establish any of the characteristics essential in Counts 2 and 3 of the indictment which are needed to prove a crime was committed.

THE COURT: Mr. Berman, I will hear you.

D



2 THE COURT: Mr. Berman, I will hear you.

3 MR. BERMAN: Your Honor, I will not argue my  
4 motion under Rule 29 as it refers to the substantive  
5 counts but as to the conspiracy counts I don't believe  
6 any conspiracy has been proven as charged, and that if  
7 Mr. Stanchich is acquitted by the Court on the conspiracy  
8 count then I don't believe there is a conspiracy count  
9 that can stand against Mr. Fitzgerald any way both on the  
10 law and on the facts.

11 As to the conspiracy count a judgment of  
12 acquittal must be granted.

13 THE COURT: What about Mr. Napoli?

14 MR. BERMAN: Whatever evidence there is against  
15 Mr. Napoli is basically mere presence or mere association  
16 by evidence and the Court is well enough aware of that  
17 that I don't have to argue that to the Court.

18 There is nothing that could ever suggest the  
19 requisite knowledge on the part of Mr. Napoli as to what  
20 was going on here, specifically a conspiracy to counterfeit.  
21 I don't think I have to elaborate on that. It is just  
22 not there, and I think it behooves the Government to come  
23 forward and try to explain to the Court where they see  
24 any such evidence.

25 THE COURT: All right.

Now we will hear from Mr. Levitt. Why don't you start with any subject to connection issues that are outstanding and show me what evidence you assert exists in the record which is sufficiently of independent evidence for me to rule it is connected. Then we will come to Mr. Schacher's overall motions and Mr. Berman's motions.

MR. LEVITT: As I understand what is open subject to connection exhibits, your Honor, they are Exhibits 4, 5 and 9, the three treasury bills, if I am not mistaken.

The Government believes, your Honor, that what it has shown is a conspiracy among Defendants Fitzgerald and Stanchich and their co-conspirator Napoli at the least.

As to the independent proof that the Government has adduced to establish the conspiracy -- that is, independent of Mr. Fitzgerald's statements -- what the Government has shown is that meetings occurred between Mr. Fitzgerald and Mr. McDonnell on November 10th at 9:30 o'clock at night, I believe, and then subsequently on November 12th at 11:00 in the morning and 2:00 in the afternoon.

As to the November 10th, after Mr. McDonnell left, that restaurant the Cattleman, it is clear from



1 the evidence independently establish that Mr. Napoli  
2 began and then was joined by Mr. Stanchich on that  
3 November 9th when the streets were deserted in a pattern  
4 clearly indicative that they were following Mr. McDonnell,  
5 and that pattern is clearly indicative -- the following  
6 is clearly indicative, that Mr. Stanchich and Mr. Napoli  
7 were trying to check Mr. McDonnell out.  
8

9 One could easily conclude that they were attempting  
10 to see whether he was going to contact another agent,  
11 whether in fact he was going to a train in New Jersey,  
12 or anything else of that nature, upon which the jury  
13 could find and it could be concluded that they were doing  
14 that for good reason.

15 Again on the morning of November 12th Mr.  
16 Stanchich, Mr. Napoli, and Mr. Fitzgerald are to be  
17 found in a Market Diner having a conversation. When  
18 they leave the diner they proceed downtown to the Wall  
19 Street area. Immediately before that we know that Mr.  
20 Fitzgerald called Agent McDonnell, and we know also that  
21 Mr. Fitzgerald called him from that phonebooth on that  
22 corner of the Market Diner.

23 THE COURT: How do you know that? Well, you  
24 know where he called from.

25 MR. LEVITT: Yes.

THE COURT: You don't know who he called.

MR. LEVITT: Agent McDonnell testified Mr. Fitzgerald called him 9:15 that morning.

THE COURT: And the agents surveillance puts him in that phonebooth at that hour.

MR. LEVITT: Yes.

THE COURT: Tell me more about the conspiracy. Let us assume for the moment that what you argue so far may be so with respect to Counts 2 and 3. Let us assume that. Under an aiding and abetting theory the jury might choose to conclude that things developed as you presented them. But give me more on the conspiracy.

MR. LEVITT: Surely, your Honor. In passing, though, your Honor, the Government's understanding of the conspiracy law is that an aiding and abetting charge as to a conspiracy need not to be stated to make people principals of a conspiracy but the conspiracy subsumes an aiding and abetting.

THE COURT: You are talking about the subsuming of Section 2 of Title 18?

MR. LEVITT: Yes, your Honor.

In addition, it has been established Mr. McDonnell met Mr. Fitzgerald at the Compass Restaurant at approximately 11:00 a.m. It has been shown by Agent



McDonnell when he walked into that Compass Restaurant there was Mr. Napoli. When he sat down with Mr. Fitzgerald two booths away. And when he went in seated in that booth initially was Mr. Stanchich, as established by Mr. Fabel in his observations. And then when Mr. McDonnell met with Mr. Fitzgerald Mr. Stanchich and Mr. Napoli were seated but two booths away.

When Mr. McDonnell left he went out of the restaurant and walked east on Morris Street. He was immediately followed by Mr. Fitzgerald. And he was immediately followed by Mr. Stanchich and Mr. Napoli.

The Government suggest that what has happened again is what happened on the night of November 10th, and that is once again Mr. McDonnell was being followed, now by all three gentlemen.

They are next seen in the lobby of the 2 Broadway. First Mr. Fitzgerald and Mr. Napoli in apparently a heated discussion pointing their fingers at each other. Shortly thereafter they are seen again, but this time it is Mr. Fitzgerald, Mr. Stanchich, and Mr. Napoli, arguing in that lobby, arguing about some business matter which all three --

MR. SCHACHER: There has been no testimony about any business matter.

1           MR. LEVITT: I apologize. Arguing about some  
2  
3 matter which --

4           MR. SCHACHER: Again there is nothing --

5           THE COURT: Please.

6           MR. SCHACHER: I am objecting.

7           THE COURT: If you wish to be heard after  
8 Mr. Levitt, I will hear you.

9           MR. LEVITT: Arguing about some matter, apparently,  
10 or at least that is what was observed, pointing their  
11 fingers at each other and discussing something that all  
12 three had in common knowledge right at that point in a  
13 business district.

14           Then, finally, shortly after 12:00, Mr. Stanchich  
15 and Mr. Napoli still in the lobby. Mr. Stanchich not  
16 there. We know, however, at thatpoint Mr. Fitzgerald  
17 was again calling Agent McDonnell. Agent McDonnell  
18 testified to that.

19           That afternoon when this meeting occurs between  
20 Mr. Fitzgerald and Mr. McDonnell in the Blarney Stone  
21 Bar we discover Mr. Napoli coming around the bend looking  
22 in the Blarney Stone Restaurant then walking up the  
23 street and standing at a shoe store just nearby.

24           At this time Mr. Fitzgerald is arrested. What  
25 we find Mr. Stanchich doing is he goes down to his car



1  
2 at this very same time, pulls out in his car, drives down  
3 Broad Street, drives up Pearl Street, drives up Whitehall  
4 Street, drives back down Bridge Street, drives back  
5 down Broad Street, and then starts to drive back down  
6 Pearl Street.

7 In short, he is circling a block again and again,  
8 and the reason he is circling a block, the clear inference  
9 to be drawn, is that he is waiting for somebody, and the  
10 only people we have seen there and the only events we  
11 know of going on at that time is a meeting in the Compass  
12 Restaurant between Agent McDonnell and Mr. Fitzgerald,  
13 and of course we know what the subject is.

14 In that meeting Agent McDonnell says to Mr.  
15 Fitzgerald I saw Eric Stanchich this morning. Is he  
16 involved in this deal?

17 Mr. Fitzgerald says, don't ask me questions  
18 about my end. He says I saw another guy, is he involved  
19 in this deal.

20 He says don't ask me questions about my end  
21 of the deal.

22 At that time Agent McDonnell stated, well, if  
23 they are involved in the deal let's get them in and  
24 maybe we can work out a deal for the whole package, and  
25 at that point Mr. Fitzgerald states, "Don't worry about it.

1           mdrf 228  
2           By the time you get back from the bank with the money  
3           I'll get rid of them."

4           The Government contends that the statement,  
5           "I'll get rid of them," is a verbal act by Mr. Fitzgerald  
6           indicating control of Mr. Stanchich and Mr. Napoli  
7           from which one can show that they are in a joint venture  
8           together.

9           The subject of that joint venture, the  
10          Government contends, is what the Government proved, dealing  
11          in counterfeit securities.

12          THE COURT: Who are you going to lay that  
13          conversation that McDonnell says occurred with Fitzgerald  
14          where he inquires about Stanchich and Fitzgerald says don't  
15          worry about it, I'll get rid of him -- how are you going to  
16          lay that at Stanchich's doorstep..

17          MR. LEVITT: If it is in fact a verbal --

18          THE COURT: Where is the independent evidence?

19          MR. LEVITT: If it is in fact a verbal act  
20          evidencing the control of the other two defendants  
21          questioned about, that is Stanchich and the strange man,  
22          then it is immediately layable upon Mr. Stanchich's  
23          doorstep under the law without any further proof or showing.  
24          The leading case in this court is U. S. versus Nuccio  
25          from the Second Circuit in which certiorari was denied,



2 establishing exactly that.

3 Indeed, I believe --

4 MR. SCHACHER: May we have the citation, your  
5 Honor?

6 MR. LEVITT: 373 Fed. 2d 168, Second Circuit,  
7 1967. Certiorari denied 387 U.S. 9069167, rehearing  
8 denied --

9 THE COURT: Give me the law. Let me hear some  
10 more.

11 MR. LEVITT: Surely, your Honor. Without going  
12 into the full facts of that matter.

13 THE COURT: Hand up Nuccio. Mark it, and I will  
14 take a look at it.

15 MR. LEVITT: The relevant portions are already  
16 marked.

17 THE COURT: Let me hear your argument on this  
18 verbal act again.

19 MR. LEVITT: As to what it shows, if it is a  
20 verbal act, is that it?

21 THE COURT: I am talking about this conversation  
22 now between Fitzgerald and McDonnell.

23 MR. LEVITT: Yes, your Honor.

24 The Government's position is, or to review it  
25 very briefly, the facts, Mr. McDonnell informed Mr.

1  
2 Fitzgerald that he had seen Stanchich in the Compass  
3 Restaurant at the meeting earlier that morning and asked  
4 if he was part of the deal.

5 Mr. Fitzgerald advised Mr. McDonnell not to  
6 ask questions about his end.

7 Mr. McDonnell stated that he had seen another  
8 person who he had not recognized but through the agents  
9 we know that that person was Napoli there also with  
10 Stanchich and asked if he was part of the deal. Again  
11 he was told don't ask questions about my end of the deal.

12 At which point McDonnell stated if Stanchich  
13 and this other fellow are part of this deal let's get  
14 them in here and I can talk to them and we can straighten  
15 the whole thing out to get an entire package, to which  
16 Mr. Fitzgerald responded, "Don't worry about them, by  
17 the time you get back with the money from the bank I will  
18 get rid of them."

19 He did not say they will be gone, he did not  
20 say it was just accidentally --

21 THE COURT: Statement of intention?

22 MR. LEVITT: Statement of intent showing, your  
23 Honor, or rather a statement which in and of itself  
24 evidences a control in this matter over Stanchich and  
25 Napoli. And there is only one way to control that, your



2 Honor, the Government would postulate, and that is because  
3 Mr. Fitzgerald is up front he is the person that controls  
4 his end of the deal as to who meets with who.

5 THE COURT: That calls for a lot of leaps.

6 MR. LEVITT: The only thing I am postulating  
7 on --

8 THE COURT: It could just as easily be argued  
9 by your opponent, Mr. Levitt, that the one who really  
10 was in control was the one who didn't show himself  
11 as much and who didn't handle the bills.

12 MR. LEVITT: If he wishes to make that argument --

13 THE COURT: They can argue that that is much more  
14 likely if we must speculate.

15 MR. LEVITT: If he wishes to make that argument  
16 the Government won't object. What the Government does say,  
17 however, is that the Government is not asking the Court  
18 to find beyond a reasonable doubt that this is what that  
19 verbal act showed. The Government is simply asking  
20 the Court to find that it was a verbal act. Upon reaching  
21 that, it comes in as admissible directly against Mr.  
22 Stanchich without any further foundation being laid for  
23 it and the test then is to whether it goes to the jury  
24 on the question --

25 THE COURT: We will worry about that later.

1           mdrf 232  
2           What do you have on verbal acts? What else do you have  
3           on the verbal act?

4           MR. LEVITT: There are several other cases.  
5           They are annotated but perhaps the Court just merely  
6           wishes to read through this half page of "Proving federal  
7           crimes."

8           THE COURT: This is on the question of what  
9           is a verbal act?

10          MR. LEVITT: Yes, your Honor.

11          THE COURT: This isn't too helpful on that  
12          question.

13          MR. LEVITT: Mostly citations.

14          THE COURT: I am not bogged down with if it is  
15          a verbal act. Is it admissible to allow the jury to  
16          then do what it wishes with respect to it. I am concerned  
17          with is it a verbal act. I am not convinced that it is.

18          MR. LEVITT: All I can state, your Honor,  
19          is that it is in the Government's opinion, not a testimonial  
20          declaration attributable to the other defendant. He  
21          isn't saying I can handle Stanchich, he isn't pointing  
22          him out, he isn't doing anything; what he is doing is  
23          making a declaration -- a statement, rather -- which  
24          in and of itself testimonially attributes nothing to  
25          Stanchich but which in and of itself evidences, the



statement itself evidences a control over Mr. Stanchich and Mr. Napoli, if the jury so interprets the inference in that way.

The Government, therefore, respectfully submits that is the qualifying test of a verbal act; that is, it is introduced not for the purpose of the testimonial quality of it but for what the statement in itself evidences.

THE COURT: All right. Is that the sum total then of what you have to offer as far as conspiracy?

MR. LEVITT: Other than that the Government also believes, your Honor, that the prior similar act of Mr. Stanchich --

THE COURT: We don't get to that until we first get past whether you have some evidence at the outset which ties the defendant in independent of that prior similar act business.

What about Mr. Berman's argument that if the conspiracy charge as to Stanchich -- if the motion is granted as to that then his client cannot -- that the case against his client cannot go to the jury on the conspiracy charge.

MR. LEVITT: The Government of course opposes it.

THE COURT: I gather that, but let me hear why.

1  
2 MR. LEVITT: In virtually every one of the  
3 conversations that Mr. Fitzgerald had in the course of  
4 dealing with Mr. McDonnell he constantly referred to  
5 his people, and Mr. Lurie. First, in order to give Mr.  
6 Lurie the bill he had to get permission from his people.  
7 During the conversations with the agents his people  
8 wanted \$25,000 on the first bill before he could get  
9 the rest of the package. His people are dealing with  
10 the printer. His people are going to use the money  
11 to get the remaining 2.9 million dollars of the counterfeits  
12 from the printer.

13 There the Government believes is obviously to  
14 be held against Mr. Fitzgerald and it is not merely empty  
15 talk. When put in the context of what Mr. Fitzgerald  
16 said then we at least still have Mr. Napoli, who is around  
17 following everybody, and the printer, and Mr. Napoli's  
18 course of conduct with Mr. Fitzgerald's statements show  
19 that Mr. Fitzgerald was clearly dealing with others  
20 in this deal on his side.

21 THE COURT: Suppose they were merely his  
22 underlings? Suppose they were just people he gave orders  
23 to to accept your argument of a moment ago. Suppose  
24 they were just lieutenants in Fitzgerald's operation,  
25 not conspirators. They do what they are told, and



1 Fitzgerald says, "Well, do this," and they do it, and,  
2 "Do that," and they do it, and consequently maybe they  
3 are involved in terms of the substantive charges, but  
4 how do you make them co-conspirators?  
5

6 MR. LEVITT: In view of Mr. Fitzgerald's  
7 statement --

8 THE COURT: He made many statements. If you  
9 accept what is stated here he made many statements which  
10 puts him in a situation of having to deal with others.  
11 That is undisputed at this point as what the evidence  
12 is so far.

13 MR. LEVITT: Yes, your Honor.

14 THE COURT: I want to know why that means that  
15 you have two or more persons here who have entered into  
16 an agreement to commit some unlawful act, et cetera.  
17 Who are these two or more persons? He is one. That is  
18 your position.

19 MR. LEVITT: Right.

20 THE COURT: Who are the others, and what  
21 evidence do you have?

22 MR. LEVITT: The Government contends Mr.  
23 Napoli, assuming Mr. Stanchich is not present, is another  
24 and that the printer who printed these is another, with  
25 whom Mr. Fitzgerald by his own statement said he was

dealing with to obtain the bills, whoever he may be.

THE COURT: I don't know why we find ourselves in these positions in these cases. There is no question in my mind that there is enough evidence to go to the jury on the substantive counts. The penalty on the substantive counts is 15 years or \$5,000 or both, and here we are, and on another one it is ten years or \$5,000 or both and here we are bogged down on a blooming conspiracy count with all of this who shot John, is there enough, is it a verbal act, were there two or more.

Why are we even taking the time to fool around with a conspiracy charge when you have got evidence sufficient, the way it looks to me right now, to get the case to the jury on the substantive counts.

What is the big deal about a conspiracy charge?

MR. LEVITT: If your Honor wants me to be perfectly frank in explanation much of the evidence we have now sufficient to prove all of these independent things we did not have at the time of the indictment but we had evidence that would warrant a conspiracy.

THE COURT: It is helpful to hear that there was some rationale.

Except for moving about in the same fashion more or less that S. which did, you have no evidence



1  
2 that Napoli participated with knowledge. You would  
3 have that conclusion drawn that he was a lateral participant  
4 and not a lineal participant?

5 MR. LEVITT: If you are speaking of chain of  
6 command, your Honor, I would say yes. The Government  
7 would say that they are all three on the same level although  
8 having different functions.

9 THE COURT: I grant the motion as to Count 1  
10 with respect to Stanchich and Fitzgerald. The motion  
11 to dismiss is granted.

12 I find, however, that those exhibits which  
13 were received subject to connection -- that only  
14 pertains to Count 1. Is that agreed, the subject to  
15 connection aspect of it only pertains to Count 1.

16 MR. LEVITT: Yes, your Honor.

17 THE COURT: So that I will inform the jury  
18 they are to disregard the subject to connection ruling  
19 and consider it as simply evidence received in the case  
20 as to Counts 2 and 3. But the motion is granted as to  
21 Count 1 as to each defendant.

22 MR. SCHACHER: May I be heard, your Honor?

23 THE COURT: Go ahead.

24 MR. SCHACHER: The reference to subject to  
25 connection, it is my contention that the Government

has failed --

THE COURT: You can only lose at this point, Mr. Schacher. The motion that you made has been granted. The subject to connection aspect is essentially a conspiracy question as I have viewed it requiring the showing of some independent evidence by a fair preponderance of proof in order for it to be received.

As to the substantive counts I consider it to be received without limitations.

MR. SCHACHER: I will be guided by your Honor's decision.

THE COURT: What the jury chooses to do about that evidence with relation to each defendant will be up to them.

MR. LEVITT: One final housekeeping chore. As to proposed Government's Exhibits 3510-A and 3526 through 31 which the Court had agreed preliminarily with the Government did not constitute 3500 material and need not be turned over, is the Court now prepared to rule as to whether or not it constitutes 3500 material insofar as the Government has now rested?

THE COURT: I guess we better get that out of the way.

MR. BERMAN: I am not sure if the Court ruled



on the substantive counts or wants us to be heard.

THE COURT: Go ahead.

MR. BERMAN: I join in whatever Mr. Schacher is going to say, but as to the two substantive counts, considering the Court's ruling here, my understanding of the law is that the same law as to mere presence or mere association and the same requisite of knowledge of the specific criminal purpose and desire to want to do something to help bring that about is required under aiding and abetting and I fail to see under these facts how Mr. Stanchich can still be kept in this case. That is of course for Mr. Schacher to argue and I will say no more about that.

I only want to express my feelings on this because it becomes cross examination -- that is the question of whether or not Mr. Stanchich remains in this case becomes cross examination to whether Mr. Fitzgerald is to present his defense, and I will renew my motion after Mr. Schacher's motions.

THE COURT: Do you want to state anything further?

MR. SCHACHER: I will adopt Mr. Berman's statements and my own statements, sir?

THE COURT: The motions you have addressed to Counts 2 and 3 are denied as to each defendant. I believe there to be enough with respect to first

1 Mr. Stanchich for a jury to find, if it chooses to,  
2 that his presence on these occasions was other than mere  
3 presence, and that the coincidences of his presence  
4 represented more than coincidences, that they may conclude  
5 if they choose to that Mr. Stanchich was following McDonnell  
6 when he left that restaurant that night. They may take  
7 into consideration his presence in that lobby, his presence  
8 in the restaurant, present with Fitzgerald and Napoli.  
9

10 If they accept that testimony they can  
11 consider what interpretation they wish to place upon it.  
12 They may consider whether or not Mr. Stanchich's conduct  
13 was such as to help to make the venture successful. They  
14 will have to determine whether or not he did that and  
15 whether he did it with knowledge that there was a criminal  
16 venture afoot.

17 The motions are denied with respect to Counts  
18 2 and 3.

19 MR. SCHACHER: I respectfully except.

20 MR. BERMAN: At this point my motion is for  
21 a severance as to the Defendant Fitzgerald, and it  
22 is my motion, I am making it, and I am making this also  
23 in the interests of justice and in the interests of  
24 making it possible for Mr. Fitzgerald to present his  
25 defense as previously noted, and by way of offer of proof



2 I would like to make part of this record the two FBI  
3 reports that I have referred to although there is no  
4 need for me to have them marked right now, I can do that  
5 later, if the Court wishes, just in terms of what the  
6 nature of his defense would be so that the record : on  
7 appeal is clear.

8 THE COURT: Just state whatever it is that you  
9 wish this record to contain and then we will move on.

10 MR. BERMAN: For reasons stated at the robing  
11 room conference Tuesday morning before we selected the  
12 jury, and as well as the conference we had last week,  
13 I don't want to articulate those in detail right now.

14 THE COURT: You need not.

15 MR. BERMAN: The Court is aware of them.

16 THE COURT: My question is, is there anything  
17 more?

18 MR. BERMAN: Just those reports which I would  
19 like to hand up to the Court, if the Court wants  
20 them now or later.

21 THE COURT: You can identify them for the record  
22 so that the record is clear, that is all.

23 MR. BERMAN: I will just identify them.

24 THE COURT: By number.

25 MR. BERMAN: They don't have 3500 numbers, but

1  
2 there is a report of a Special Agent Gerald Kolb which  
3 bears the date November 12th at the top of it, and there  
4 is a report by Special Agent Lauss, John J. Lauss, which  
5 bears the date January 5, 1976 in it. Those are the  
6 dates of the reports, not the dates of the occurrences  
7 referred to in them. These reports have been provided  
8 to me by Mr. Levitt and there is no dispute as to which  
9 reports we are speaking about.

10 THE COURT: All right.

11 MR. BERMAN: Just by way of identification.

12 THE COURT: All right. The motion is denied.

13 Mr. Levitt, I hand you 3530 and direct your  
14 attention to the fourth paragraph on page 2, and ask you  
15 whether that falls within 3500 given the testimony  
16 presented in the case thus far.

17 MR. LEVITT: I don't believe so, your Honor.

18 THE COURT: All right.

19 I have examined the material in Government's  
20 Exhibit 3510-A file, which is one four-page document,  
21 and the Government's 3526 through 3531, and I don't find  
22 that pursuant to 3500 that need be shared with defendants'  
23 attorneys.

24 I am going to make a ruling on those exhibits  
25 which were received subject to connection. That is 4 and 5



1 and Mr. Levitt says 9 as well. I find them to be connected  
2 and will inform the jury accordingly.  
3

4 MR. LEVITT: Thank you, sir.

5 MR. BERMAN: Your Honor, two brief applications.  
6 I would ask the Government's Exhibit 3519 which we have  
7 be deemed part of the record. Not part of the record  
8 before the jury but the record on my application for the  
9 severance. It is specifically page 4, the next to the  
10 last paragraph, in which it relates Mr. Fitzgerald's  
11 post-arrest statement.

12 THE COURT: Any objection?

13 MR. LEVITT: I thought the motion to have it  
14 first made part of the record was denied. Am I wrong  
15 in the Court's ruling that when Mr. Berman moved to  
16 have the two agents' early reports made part of their  
17 record by identification the Court denied his motion?

18 THE COURT: No.

19 MR. LEVITT: I'm wrong?

20 THE COURT: I believe you are wrong, yes.

21 MR. LEVITT: The Government has no objection  
22 to that, your Honor. The Government would just like  
23 to state along that line, however, for the record in  
24 event of appeal that is the Government's position that  
25 the memoranda which Mr. Berman has referred to are not

complete in stating the story, and, of course, since the Government does not anticipate or believe it will have the opportunity to bring out the full story any appeal on that the Government would have to support its proposition by probably a separate affidavit filed at the same time.

THE COURT: All right.

MR. BERMAN: My other application, your Honor, is for the purpose of if the jury should ask to see the indictment, since the Government is going to have to prepare a clean copy without a conspiracy count anyway, and will have to renumber Counts 2 and 3 as now Counts 1 and 2, when they do that can they also be directed to eliminate the a/k/a Mike reference, since it adds nothing and since it is obviously Mr. Fitzgerald's middle name by which he is known. The indictment refers to him as Alan Michael Fitzgerald, a/k/a Mike, and the implication it is an alias or perhaps some name he was once booked under, or whatever fantasy's the jury might derive from that, nothing positive is derived from keeping it in there.

MR. LEVITT: It is my understanding of the law, especially since the jury has known of this first count, my understanding of the law is that the Court, once



1 the grand jury has voted an indictment may not delete  
2 or add to an indictment wit out causing prejudicial  
3 error.  
4

5 THE COURT: I don't understand that I have  
6 the authority to tinker around with an indictment. I  
7 am denying your application as to the Mike part.

8 What are you going to do about this -- you will  
9 have to redact. Now, I don't feel strongly one way or  
10 the other whether Counts 2 and 3 are still called Counts  
11 2 and 3 or 1 and 2.

12 You are proposing not to redact Count 1?

13 MR. LEVITT: Yes, your Honor. It is already  
14 before the jury.

15 THE COURT: No, Count 1 is not to be a part  
16 of the indictment will be made available to the jury if  
17 they ask for it. Count 1, given the ruling, will be  
18 redacted.

19 MR. LEVITT: May I ask if Mr. Schacher joins  
20 in Mr. Berman's motion?

21 THE COURT: Do you, sir?

22 MR. SCHACHER: May I hear it again?

23 MR. LEVITT: The motion was Count 1 be redacted  
24 and a form of the indictment without Count 1 be submitted  
25 to the jury.

1  
2 MR. SCHACHER: I will go along with it.

3 THE COURT: I think we will leave the 2 and 3  
4 alone.

5 MR. LEVITT: Would the Court wish me to retype  
6 the entire indictment or redact that portion where  
7 Count 1 is listed?

8 THE COURT: If it achieves the purpose of  
9 what we are about it suffices to redact. You will have  
10 to -- I am satisfied if it is simply redacted. It need  
11 not be retyped, because you are perfectly right the  
12 jury sat here for several days and heard us talk about  
13 alleged conspiracies. It is not like they don't know  
14 that has been a charge.

15 You also made your opening statement and referred  
16 to it throughout.

17 MR. SCHACHER: Your Honor, you just now stated  
18 as to Exhibits 4, 5 and 9 you will tell the jury they  
19 were subject --

20 THE COURT: I have announced them here I  
21 find them subject to connection, I find sufficient  
22 evidence as required by the Geeney rule to find them  
23 connected.

24 MR. SCHACHER: My concern is with the terminology  
25 of the language used to the jury.



1 THE COURT: I will try to explain what it means.

2 MR. SCHACHER: They may hear subject to connection  
3 and they may get the position that the defendant is guilty.

4 THE COURT: I will try to explain that I am  
5 not making a finding of fact. Is there anything further  
6 we need handle at this time? If not, when they come out  
7 I will indicate the ruling on it subject to connection  
8 and then the case will be with the defendants.

9 MR. SCHACHER: May I have a five minute break  
10 now.

11 THE COURT: Yes.

12 MR. BERMAN: Just one word. I suppose the next  
13 thing that will happen when we come back, after you announce  
14 that instruction as to the connection is that you would  
15 then turn to me and ask if Mr. Fitzgerald intends to  
16 offer any evidence.

17 THE COURT: I am simply going to turn to you  
18 and say what is your wish?

19 MR. BERMAN: Very well. At that point I will  
20 say Mr. Fitzgerald rests.

21 THE COURT: All right. Five minutes.

22 (Recess.)  
23

CERTIFICATE OF SERVICE

Oct 22 , 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to counsel for appellant Fitzgerald.

Rgi. S. K. G. B. G.